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No. 937

In the

Supreme Court of the United States

OCTOBER TERM, 1957

LECUNO OIL COMPANY,

Petitioner,

against

T. P. SMITH, JR., Individually and as Trustee, HAZEL COCKE JOBE and Husband, CLEVE B. JOBE, CAL COCKE TRAMMELL, and WINSTON TAYLOR,

Respondents.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS

Respondents pray that a Writ of Certiorari be denied to review the judgment of the Court of Civil Appeals, Sixth Supreme Judicial District of Texas, sitting at Texarkana, Texas, and in which the Supreme Court of Texas refused a Writ of Error on January 15, 1958, Rehearing Denied February 26, 1958. (R. 20.)*

*References marked "R" are to the Certified Record.

JURISDICTION CHALLENGED

The Petitioner seeks to invoke the jurisdiction of this Honorable Court pursuant to the provisions of 28 USCA, Sec. 1257(3). The Respondents respectfully disagree that this Court has jurisdiction in this case. The Respondents herein have never at any time questioned any rulings of the Office of Price Stabilization or the Federal Power Commission, and from its inception have always proceeded in this case on the one theory that the Petitioner was not accounting to the Respondents for their royalty interest in accordance with the terms of the oil and gas leases owned by Petitioner.

As is shown from opinion of the Court of Civil Appeals, *LeCuno Oil Company v. Smith, et al., 306 S. W. 2d, Page 190, at page 192:*

> "* * * In an original and later an amended answer Appellant (Petitioner here) pled defensively that the subject matter in controversy was within the exclusive jurisdiction of the Federal Power Commission under the Natural Gas Act, 15 U. S. C. A., Sec. 717 et seq., and that all rates, charges and field prices or changes therein for the royalty gas must be set by that agency. * * *." (R. 1, page 29.)

The Respondents are citizens and landowners of Harrison County, Texas, where the land and oil, gas and mineral leases in question are located.

The Petitioner is a partnership composed solely of citizens of Texas, who acquired by assignment, oil, gas and mineral leases on Respondents' lands, and drilled gas wells

which have been producing during the time in question. Following the completion of the wells, the parties entered into gas division orders which provide the following basis upon which royalty should be computed, viz.,

> "Gas received under this division order shall be paid for to the parties entitled thereto according to the division of interest set out above *at the price received at the wells by LeCuno;* settlement therefor to be made on or before the 25th of each month for all gas taken during the previous month, or previous meter period if different from a calendar month, but settlement is to be made at least once each month."

This agreement remained in effect during the period involved in this lawsuit.

On June 15, 1951, the Petitioner entered into a Gas Sales Contract with Mississippi River Fuel Corporation, providing for sale of the gas produced at a central point agreed upon by the parties to said contract, and fixing the price, as follows:

> "(a) During the two years beginning at the date hereof — 12¢
> "(b) During the next two years of the term hereof — 13¢."

This contract remained in effect during the period in question, and the Petitioner was actually paid by Mississippi River Fuel Corporation in accordance with the terms of said contract. A small portion of the gas produced was sold to Texas Eastern Transmission Company, and the same charges were made as in the case of Mississippi River Fuel Corporation.

The Respondents have conceded at all times that the Petitioner is entitled to a reasonable charge for gathering, transporting and processing gas produced from the wells in question and delivered to the central point which is designated in the contract.

The jury found that 1.25¢ per MCF was a reasonable charge for the service rendered. Judgment was entered for the Respondents for the difference between the charge found to be reasonable by the jury, and 2¢ per MCF which was arbitrarily deducted by the Petitioner without consent of Respondents before it accounted to the Respondents (royalty owners) for the money due to them under their respective leases and the division orders.

Thus, this Court has before it a suit between Royalty Owners who entered into oil, gas and mineral leases held by Petitioner for an accounting to them of moneys received by the Petitioner from gas produced and sold pursuant to terms of a Gas Sales Contract.

At all times, the Petitioner was paid for gas produced and sold in accordance with the terms of its contract. No regulatory body interferred with full payment, and, in fact, approved of the sales price for gas sold at a central delivery point.

The record shows repeated efforts by the Petitioner to obtain a decision from the Office of Price Stabilization, but on January 3, 1952, the Office of Price Stabilization disapproved the Petitioner's request (R.), in its reply of January 3, 1952. (Appendix, pages 28, et seq.)

The Office of Price Stabilization held:

"(b) All provisions of letter order L 127, except as changed by amendment thereto shall remain in full force and effect as far as you are concerned." (R. .)
(Appendix, pages 28, et seq.)

Therefore, the Office of Price Stabilization refused at all times to approve of a charge of 2¼¢ for gathering, compression and dehydration charges.

There is no question of a wellhead sale in this case; no market was available at the wellhead, so the producer transported the gas to a point of sale some distance from the wells. The Office of Price Stabilization specifically refused to pass upon the reasonableness of charges which are involved in this lawsuit.

The Federal Power Commission has approved of the contractual price for the sale of gas at a central delivery point. At no point has this Body gone behind the price fixed at the central delivery point and regulated the gas producer.

The Respondents have sought an accounting for the money due them because the Courts have held that the Federal Power Commission is not a proper body to award money judgments.

AUTHORITIES

In the case of *Magnolia Petroleum Company v. Texas Illinois Natural Gas Pipeline Company, 130 Fed. Supp.*

890, 4 Oil & Gas Reporter, 408-411, Judge Connally ruled on a motion to dismiss, as follows:

> "But the Commission has no authority to award a money judgment if in fact the plaintiff be entitled thereto; and when reached for a trial on the merit, this Court may determine what the lawful rate may have been at the time in question (whether fixed by contract or by commission order), and may further enter such judgment as the facts warrant."

In *Albright v. Teas, 106 U. S. 613, 1 S. Ct. 550, 27 Lawyers' Edition 295*, we had a suit for discovery, for an accounting of sums due because of royalties payable under a contract, and other matters. The defendants filed a petition for removal of the cause to the Circuit Court, on the theory that the suit was one arising under the Patent laws of the United States. The Circuit Court remanded the suit on the grounds that the case was not one arising under the Patent laws of the United States, but was a suit for accounting and relief for the settlement of controversies existing under a contract. The Court held that the suit, notwithstanding the collateral inquiry about the patent, still remained a suit on the contract to recover royalties, and was not a suit upon a patent and that the Federal Court lacked jurisdiction. In the present case, the Respondents have never questioned any of the orders of the Office of Price Stabilization or the orders of the Federal Power Commission.

In *Vandervoer v. Erie Malleable Iron Company, 238 Fed. Reporter 2d 510, at page 513*, we find the following:

> "Although the bringing of actions arising under the Patent laws is admittedly restricted to the Federal

Courts, it has long been established that actions brought to enforce contracts of which a patent is the subject must, in the absence of diversity of citizenship, be brought in the State Courts. * * *."

In *Avon Publishing Company, Inc. v. American News Company, Inc., 143 Fed. Supp. 516*, we had a suit brought for relief under the Federal Anti-Trust Laws for temporary injunction, whereby the plaintiffs sought to enjoin the defendants from prosecuting a suit in the New York State Supreme Court, in which the present plaintiffs were defendants. In the State Court action, plaintiffs sued defendants for monetary damages on the basis that a contract was fraudulent and void. The defendants (plaintiffs in this suit) answered by pleading affirmatively an anti-trust claim against the plaintiff. Prior to the State Court action the parties instituted a suit in Federal Court regarding the anti-trust violations. The Court in refusing to enjoin the State Court from taking any action until the Federal Court matter had been disposed of, held that the State Court action (which was based solely on a contract for damages), could not be enjoined even though anti-trust laws, the violation of which constituted a Federal matter, had been interposed as a defense in the State action.

The petitioner contends that the Respondents should exhaust all administrative remedies before resorting to the Courts, whereas in the case of *Magnolia Petroleum Company v. Texas Illinois Natural Gas Pipeline Company*, supra, Judge Connally expressly held that the Federal Power Commission could not award a money judgment, but that such action would have to be determined by the Courts.

Petitioner has fully tried its case before the Trial Court, Court of Civil Appeals, and Supreme Court of Texas. It now complains of action of these Courts in following the established law of Contracts in the State of Texas.

The Office of Price Stabilization and Federal Power Commission have approved payment. The purchasers of natural gas (Mississippi River Fuel Corporation and Texas Eastern Transmission Company) have paid in accordance with approved practices on the basis of the provisions in their contract. Now we come to a simple proposition of whether or not the producer of natural gas should be permitted to arbitrarily fix a charge without notice or hearing for gathering, compressing and processing natural gas sold from wells on Respondents' land, or whether the Petitioner should be required to account to the royalty owners (Respondents herein) upon the basis of its contract, no regulatory body having intervened and having fixed the charge to be made.

CONCLUSION

Since no rule or regulation fixing a charge was entered by the Office of Price Stabilization, and since no rate schedule fixing a charge has been approved for the Federal Power Commission, effective during the period involved in this lawsuit, the Respondents properly filed their suit for the money that was due them under their contract with Petitioner in the District Court of the State of Texas, which properly had jurisdiction of this cause of action.

Wherefore, Respondents respectfully pray that the Petition for Writ of Certiorari be, in all things, denied.

Respectfully submitted,

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